

Court Asked to Rule On Secrecy Plan for Ex-FBI Men's Trial

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The government has proposed an unusual procedure to protect national security secrets at the trial of two former top-ranking FBI officials charged with approving illegal break-ins in the early 1970s, sources say.

Defense lawyers for former FBI officials W. Mark Felt and Edward S. Miller—whose trial has been postponed nine times because of problems over protecting classified information—argue the procedure would be unconstitutional.

But the Justice Department's hopes of prosecuting the two lieutenants to former acting FBI director L. Patrick Gray could hinge on whether a federal judge approves its proposed protective order.

Under the proposal, defense lawyers would be required to advise U.S. District Court Judge William Bryant whenever they plan to ask a witness a question that could elicit disclosure of certain intelligence information. The judge then would decide whether to bar the question.

Bryant, chief judge for the U.S. District Court here, scheduled another closed hearing on the issue for today.

Gray, Felt, the bureau's former No. 2 man, and Miller, its former intelligence chief, were indicted in 1978 on conspiracy charges alleging that they approved illegal break-ins, wiretaps and mail-openings in a hunt for fugitive members of the radical Weather Underground in the early 1970s. The cases against all three men have dragged on for nearly 2½ years.

Bryant agreed to sever the case against Gray from the charges against his aides because their defenses were different: Gray contended he never approved the break-ins, while Felt and Miller argued that the surveillance activities were legal.

Gray's trial has been delayed indefinitely. The Felt-Miller case, knotted in behind-the-scenes legal battles over which evidence may be disclosed at the trial, most recently was scheduled to begin Aug. 18 but now also has been delayed indefinitely.

Sources say prosecutors presented the proposed order to Bryant last Tuesday during one of a series of closed-door, pretrial hearings.

Defense lawyers, who have had access to about 2,000 pages of heavily censored intelligence documents pertaining to the case, have complained bitterly to the judge about the order.

The clash underscores problems the Justice Department faces in trying to prosecute public figures in intelligence-related matters without disclosing classified information.

Defense lawyers have succeeded in the past in averting prosecutions or have forced the government to drop cases against their clients by threatening to disclose such information at trial—a tactic called "graymail" by the Justice Department.